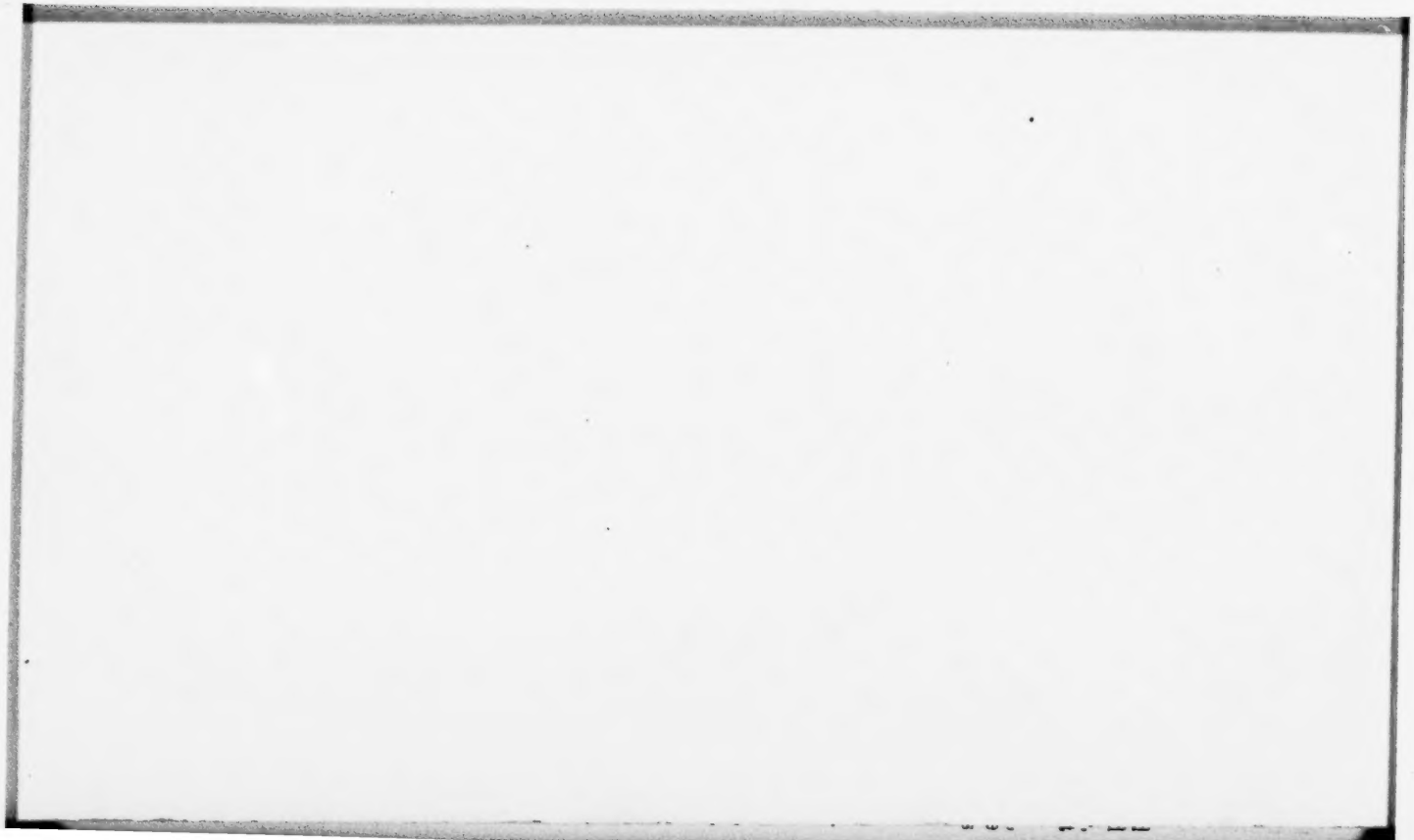

No. 196.

Brf. of Nash, Davis & Addison for P. E.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM—1900.

No. 196.

Filed Jan. 14, 1901.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error*,

vs.

WILLIAM M. WARREN, *Defendant in Error*.

Error to the Supreme Court of the State of Ohio.
No. 17,631.

Brief for Plaintiff in Error.

GEO. K. NASH,
W. Z. DAVIS AND
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Attorneys for Plaintiffs in Error.

COLUMBUS:
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STATEMENT OF FACTS.

The sole question for determination in this case, is the constitutionality of Section 3625 of Bates' Edition of the Revised Statutes of Ohio, Vol. 75, Ohio Laws, 572.

This action was begun in the Common Pleas Court of the State of Ohio, being the Court of original jurisdiction, and the trial Court for such cases in the State of Ohio, upon a policy of insurance issued upon the 27th day of September, 1895, by the plaintiff in error, The John Hancock Mutual Life Insurance Company, upon the life of George E. Warren, and for the benefit of William M. Warren, defendant in error. George E. Warren was found dead on the 26th day of November, of the same year, about two months after the policy was issued.

The plaintiff in error, defendant below, resisted the payment of the amount of the policy, and defended said suit on the ground that the policy had been fraudulently obtained by the decedent, George E. Warren, and that said answers made by said Warren, in his application for the insurance covered by the policy, which application was made a part of the policy, and which, by the terms of the policy were expressly warranted to be complete and true, were false, and that he had obtained the insurance by deceiving and defrauding the Insurance Company. That had it known of the fraud and deception practiced by the said George E. Warren, or had it known of the falsity of said answers, said policy of insurance would not have been issued.

It was further claimed by the plaintiff in error, defendant below, that the said false and fraudulent answers were the basis upon which said contract or policy of insurance mentioned in plaintiff's petition was issued, and that said company would not have issued said policy of insurance, had it known of the deception and fraud of said George E. Warren, practiced upon said company to obtain said insurance.

The parts of the application, which were made a part of the policy of insurance, material to the questions raised by the record, are as follows:

"*Q.* 9. Are you now in good health? *A.* Yes."

"*Q.* 11*a*. Have you been obliged to consult a doctor at any time during the last ten years? If so, when, and for what? *A.* 1893. Malarial fever, one week's duration." (Transcript of Record p. 99, also p. 6.)

"*Q.* 18. Have you ever had, or been predisposed to any of the following diseases or infirmities? If so, state the full particulars, giving dates, severity, duration, nature and number of attacks. Answer yes or no to each." (Transcript of Record p. 7, also p. 101.)

Among the diseases or infirmities enumerated under Question 18, was the following:

"*Q.* Stricture of urethra. *A.* No."

"*Q.* 19. Have you ever had any illness or disease other than as stated by you above? State full particulars. *A.* No."

Following the questions and answers to the questions stated above, the following express warranty is inserted in the policy:

"I hereby warrant that all statements and answers made by me above are complete and true. * * * * And if said policy be issued, this application, with answers made to the Medical Examiner shall be a part thereof. Signed, GEORGE E. WARREN, *Applicant.*"

(Transcript of Record pages 7 and 8, also p. 101.)

The undisputed testimony in the record shows that in February, 1893, George E. Warren had gonorrhea and stricture. (See Transcript of Record, testimony Dr. Wells, pages 18, 19, 20 and 21.)

No testimony was offered which even tended to disprove the evidence of Dr. Wells. Upon the other hand, the evidence of Warren's other doctor, Arthur L. Gast, whom Warren consulted after leaving Dr. Wells, corroborates and supports the testimony of Dr. Wells.

(Transcript of Record, pages 30 and 34.)

Plaintiff below tried to break the force of this admission by showing gonorrhea and stricture were harmless diseases. And it would seem from the verdict that they did so deceive and convince the jury who were under the charge of the Court and the construction put upon the statute permitted to make a new contract to the effect that it was.

It will be observed that this policy of insurance was issued and accepted upon the express condition that the answers and

statements in the application therefor were warranted complete and true in all respects, and that if the policy should be obtained by any untrue statement or answer, or by any false representation or concealment, it should be void.

The undisputed facts developed in the case were such that under the decision rendered by the Supreme Court of the State of Ohio in the case of *Insurance Company* v. *Pyle*, 44 O. S., 19, the Court would have been compelled to instruct the jury to return a verdict in favor of the defendant below, plaintiff in error, The John Hancock Mutual Life Insurance Company.

This proposition was recognized both by the trial Court and the Supreme Court of Ohio, but it was claimed, and the trial Court so charged the jury, that Section 3625 of the Revised Statutes of Ohio, was enacted after the decision of the Supreme Court referred to above, and that it changed and altered the law in Ohio, applicable to cases of fraud in procuring insurance, and that it abridged the right of the parties to such an insurance contract, to make warranties, and prevented them from entering into such a contract. In other words, the law relating to contracts and warranties and the rules of evidence adopted, established and recognized by the Supreme Court of Ohio in the proof of fraud, were abrogated and disregarded, because the jury were instructed by the trial Court that the whole question was governed and controlled by Section 3625, Revised Statutes of Ohio, and that under that section the jury were to determine, even after a clear case of fraud had been proven, whether such fraud was material to the risk and should avoid the policy.

To show that the whole case turned upon the statute, we quote the following from the charge of the Court:

"Now, having determined that question, the next question for you to determine in the logical order is whether or not these answers made by George E. Warren to the questions, were false or not, and if they were false, were the questions and answers of such a character as would, under the law, avoid the policy of insurance issued by the defendant to the plaintiff."

(Transcript of the Record, p. 94.)

Further on, the trial Court instructing the jury as to their duty in case they should find the answers false, used the following language:

"If you find that they were, then you will take up and consider and determine whether or not the question to which false answer was made by George E. Warren as you find from the testimony was of such a character as under the law would avoid the policy of insurance.

"Our statute provides that 'no answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer.'"

This is the exact language of the statute.

"Every answer that is made in an application for a policy of insurance, even if false, would not have the effect of avoiding the policy of insurance. The question asked of which the false answer is given, must be of the character designated in the provision of the statute which I have read in your hearing."

This section of the statute referred to is Section 3625, and the one now in question.

The Judge further continues in his charge—

> "This law being in force at the time this policy of insurance was taken out, is applicable to the policy of insurance involved in this case. *And is applicable to questions and answers in the application that by the term of the policy are made express warranties as well as those that are not.*"

Further on, in referring to the statute, the trial Court charged the jury as follows:

> "Now, if you find any statement made by George E. Warren in his application to the defendant for this policy of insurance was false and that question and that answer was of the character designated in this statute, then it would avoid the policy, that is, if it was willfully false and fraudulently made, and material and induced the company to issue the policy, and but for it they would not have issued it, and they had no knowledge of it, then it would avoid the policy." (Transcript of Record, p. 95.)

Proper exceptions were noted to each of these charges, and brought before the Supreme Court of the State of Ohio.

Counsel for plaintiff in error, defendant below, requested the Court to give the jury the following special charge or instruction:

> "The policy or contract upon which this action is based and the application made by George E. Warren for the same, constitute a warranty that all answers by said Warren contained therein are true, and if any one or more of said answers is untrue, though made without actual fraud, and under an innocent misapprehension of the purport of the questions and answers, no contract of insurance is thereby made, and the contract is void *ab initio*, and your verdict should be for the defendant."
>
> (Transcript of Record, p. 90.)

This charge or request was refused by the Court, and the exceptions properly saved.

The charge as given, and the request to charge which was refused, clearly raised the question as to the validity of Sec. 3625 of the Revised Statutes of Ohio and the one now under consideration.

The jury returned a verdict for the plaintiff, which was affirmed by the Circuit Court, and finally by the Supreme Court of Ohio, which decision is reported in full in *The John Hancock Mutual Life Insurance Company* v. *Warren*, 59 O. S., 45, a certified copy of which decision is attached to and printed in full in the appendix to this brief.

We maintained in the Supreme Court of Ohio, and we here assert that Section 3625 of the Revised Statutes of Ohio, is unconstitutional, because it is inhibited by the 14th Amendment to the Constitution of the United States, Section 1, Article 1, and Section 16, Article 1, of the Constitution of Ohio.

In the Supreme Court of Ohio it was claimed that the enactment violated the Constitution of Ohio, but that question is not material here.

The Supreme Court of Ohio held that the Section of the Statute in question was a valid enactment, and that it violated no provisions of either the Constitution of the State of Ohio or of the United States, and it is to reverse this holding of the Supreme Court of Ohio that error is prosecuted to this Court.

ARGUMENT.

We maintain that Section 3625 of the Revised Statutes of Ohio is unconstitutional, because it deprives the plaintiff in error and others of liberty and property, without due process of law, denies to the plaintiff in error and others, the equal protection of the laws, and is odious and obnoxious class legislation, contrary to the inhibition of the XIV Amendment to the Constitution of the United States.

Section 3625 of the Revised Statutes of Ohio, and the one in question, is in the following language:

> "No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recovery upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and moreover that the agent or company had no knowledge of the falsity or fraud of such answer."

It will be noted that the statute provides that no answer in an application shall be used in evidence, unless it be clearly proved that such answer is willfully false and is fraudulently made, thus changing the rules of law in this particular class of contracts, to-wit: life insurance contracts, and applying a different rule of evidence to them from that which is applied to any other contract. Before the application containing the false answer, can be introduced in evidence at all, the statute requires that it be clearly proved that the answer therein contained is willfully false and fraudulently made; in other words, the party seeking to introduce the application, is compelled to establish a clear case of fraud, before he can introduce a part of his evidence to prove fraud.

This language of the statute is almost absurd, and yet it was given in the charge to the jury, and sustained by the Supreme Court of Ohio.

It will be noticed that a preponderance of the evidence establishing fraud, is not sufficient, nor is it sufficient to admit a part of the evidence of fraud, but it must be clearly proven, thus requiring a stronger and a different rule of proof from that required in other cases.

It is not sufficient to show that the answer is false, but it must be shown in addition that it is willfully false. In Ohio, it has long been the established rule of law, that where one of the parties to a contract, by means of false representations, induces another to enter into a contract on the faith of such representations, the party misled may either avoid or rescind the contract, or recover for the breach thereof, *although the party making the false representations, believed them to be true when he made them, and had good reason for so believing.*

Mulvey v. *King*, 39 O. S., 491.
Irwin v. *Wilson*, 45 O. S., 426. Opinion 437.

The statute in question, however, provides that before fraud will vitiate a contract for life insurance, it must be clearly proved that the fraud is willful. Under the statute, a party securing a contract for life insurance, may be as reckless and as careless and as wanton as he pleases in his statements and representations and warranties, and yet the statute protects him. Reckless, wanton and careless misrepresentations, although it is the duty of the party making the representations to know the fact, in no way binds him under the statute, or vitiates his contract if he wishes to insist upon the insurer performing it. The contrary is true, however, of the insurer and a different rule of law is applied to it.

This is not true of any contract, except the contract to procure insurance on one's life. In all other contracts both parties are bound by the same law. It isn't even true touching contracts for fire insurance, marine insurance or accident insurance, or any of the other numerous classes of insurance that are the subject of contract in the State of Ohio, and of course, no such rule of law applies to any other contract, touching the large class of business and things concerning which contracts are made in the State of Ohio.

But this is not all. It not only requires the insurer seeking to avoid such a contract, to clearly prove that the answer in the application is willfully false and was fraudulently made—two conditions that are not required to show fraud in any other contract—but in addition, it leaves it to the Court and the jury who have had nothing whatever to do with the contract, and have no power to either make or alter it, to say what is material, because the statute provides in addition to the requirement that it should be proved that such answer was clearly false and fraudulently made, it must be shown that it is material, thus again establishing a different law controlling fraud in contracts for life insurance, from that which obtains in any other class of contracts, and thus putting it in the power of the Court or jury to make a new and different contract from the one made by the parties.

It will be observed that in the case at bar the jury were permitted and allowed to and did attach and adopt an entirely different meaning and definition for the word "material," than that established by the decisions and precedents of the Courts.

Even though the statute on its face was not vulnerable to the objection raised, if the Court in construing it made it effective to deprive persons of their constitutional privileges, it is equally vicious and must fall under the inhibition of the Constitution.

This rule was laid down clearly in *Yeck Wo* v. *Hopkins*, 118 U. S., 356, where Mr. Justice MATTHEWS, in delivering the opinion of the Court, on page 373 and 374, says:

"In the present case we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of as tried merely by opportunities which their terms afford of unequal and unjust discrimination in their administration. For the cases present the ordinance in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with their administration and thus representing the state itself with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioner as to all other persons by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.

"*Though the law itself be fair on its face and impartial in its appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.*

"This principle of interpretation has been sanctioned by this Court in—

Henderson v. *The Mayor of New York*, 92 U. S., 259.
Chy Lung v. *Freeman*, 92 U. S., 275.
Ex parte Virginia, 100 U. S., 339.
Neal v. *Delaware*, 103 U. S., 370.
Soon Hing v. *Crowley*, 113 U. S., 703."

The insurer is not only required to prove that the answers were willfully false and fraudulently made by a higher rule of proof than that required in all other contracts, but in

addition, after establishing fraud under this rule of law, he is required to go farther and show that the fraud was such as the jury might think material.

In no other contracts does the law of Ohio require the party seeking to avoid them, to show that the fraud, in the opinion of the Court or jury is material. In other contracts, the party to a contract who is guilty of fraud and misrepresentation, is not heard to say that no matter if he is guilty of fraud and misrepresentation, it is not material to the other party and did not injure him, and that therefore he cannot take advantage of it, where the parties have warranted their statements, or stipulated that they are material. And this rule of law has passed into a property right. But in this one class of contracts, a new and different rule of law is established. No matter what the terms of the contract between the parties may be, no matter how material they may have deemed the answers and representations, yet the Court and the jury are permitted to fix the liability by what they may think are material representations, and thus make a new contract or different contract from the one made by the parties. In other words, when the insurer proves that the policy was obtained from it by fraud, and this too, by a higher and stronger rule of proof than is required in any other class of contracts, and has also shown that the fraud is willful, yet it must in addition, prove that the fraud is material *in the opinion of the jury.*

The author of this measure did not seem to be satisfied with imposing all the additional burdens we have before pointed out, upon one of the parties to such contracts, but he goes further and requires the party to such a contract to also prove the negative of the former proposition, and show that but for such false answer, the company would not have

issued the policy. In other words, the insurer is compelled and required to prove that the particular answer or answers, attempted to be introduced as evidence of fraud caused the company to issue the policy, no matter what other important questions and answers may be contained in the application or policy. The jury must be convinced that these fraudulent answers alone induced the company to issue the policy. And this is the construction put upon this statute by the Court and jury in the case at bar.

But this is not all. The section of the statute closes with the provision that it is not sufficient for the company issuing the policy of life insurance, to prove that the policy was procured by fraud, willful and malicious as it may be, and fraud that was imposed upon the company for the purpose of procuring the policy, and which did operate to procure the policy, but in order to constitute a defense to a suit upon the policy, the insurer is required to go further and prove that its agent had no knowledge of the fraud perpetrated by the party obtaining the insurance. No such rule of law was ever heard of in any other case. It requires the party setting up and proving the fraud, to anticipate the defense which the other might make to the fraud by requiring the insurer to prove he had no knowledge of the fraud. And this must be proved too, not by a preponderance of the evidence, but as the statute specifically requires, clearly proved, a fact which the plaintiff in a suit upon any other kind of a contract in the State of Ohio, where fraud was set up as a defense to the contract, would be called upon to prove, and which fact, the defendant itself, in a suit under any other contract, would not even be permitted to prove, because it would be anticipating the proof of the plaintiff in meeting such a defense.

These considerations would certainly seem sufficient to condemn any statute, and yet there is another and additional reason why the statute ought not be permitted to stand as the law of the State of Ohio.

The Court charged the jury, as already pointed out, that the same rule applied to representations and answers, whether they were by the terms of the policy made warranties, or not. In other words, it charged the jury that even where the parties by the express terms of the contract, had warranted certain things to be true, and had made certain representations material, that the insurer would be required to make the same proof in those cases, as if such terms were not incorporated into the contract. In other words, they must make the proof required under Section 3625.

On this subject, the trial Court used the following language:

> "This law being in force at the time this policy of insurance was taken out, is applicable to the policy of insurance involved in this case, and *is applicable to the questions and answers in the application, that by the terms of the policy are made express warranties, as well as those that are not.*"

The Supreme Court of Ohio put the same construction upon the statute. This construction puts an end to warranties in life insurance contracts, because as construed by the Courts of Ohio, it is immaterial whether the parties to the contract warrant their representations, or not, because the statute requires the same rule of proof in both instances, and as thus construed, abrogates the right to make a warranty.

That a warranty is a contract, pure and simple, is so well known, and so elementary, that it seems even superfluous to make the statement. The statute then clearly prohibits the making of a contract, and interferes with the rights and liberties guaranteed by the Constitution, to all persons who are *sui juries* to make their own contracts.

We have already pointed out the part of the charge of the trial Court which was supported and upheld as the proper construction of this statute by the Supreme Court of Ohio, in which it was said that the jury must determine, whether or not, the representations made were material. (See Transcript of Record, bottom page 94.)

To summarize then, the statute requires:

First. That before the insurer can even defend on the ground of fraud or misrepresentation, or use the application upon which the insurance had been obtained in evidence, he is required to clearly prove that such answer is false.

Second. That even if it is false and operates as a fraud upon the insurer, it must be shown that it is *willfully* false, and was *fraudulently* made.

Third. Even though it is shown that the answer operates as a fraud upon the company, and that it was willfully false and fraudulently made, the jury are permitted, under the statute, after all this proof has been made, to say whether or not the fraud is material, and whether or not it induced the company to issue the policy, and if in their opinion either of these elements is lacking, the proof of willful, malicious fraud, avails the insurer nothing.

Fourth. Even though the insurer proves clearly that the answer operates as a fraud, that it is willfully false and fraudulently made, and is material, and induced the company to issue the policy, yet the insurer is required, in addition to establishing these facts by such a rule of proof, to go further, and prove that the policy would not have been issued had the representations not been made.

Fifth. In addition to establishing all the facts, and complying with all the requirements pointed out in the four preceding paragraphs, the insurer is required to anticipate the

defense of the plaintiff to the fraud, and prove that neither the agent nor the company had any knowledge of the falsehood and fraud.

Surely such a statute is an anomaly, but it does not stop with this.

It prohibits, as construed by the Supreme Court of Ohio, parties making lawful insurance contracts, from entering into or making a contract of warranty. This is as clearly so as if the statute had said, "It shall be unlawful for parties entering into life insurance contracts to make warranties." The jury were, in the case at bar, instructed to disregard the warranties, no matter what the terms of the contract between the parties were. The Court in effect, said to the jury, "You have a right to make such a contract between the parties to this contract as you think the parties ought to have made for themselves."

This is certainly depriving the insurer, and others, of property and of liberty, without due process of law, and depriving parties or persons entering into contracts for life insurance of the equal protection of the laws.

DUE PROCESS OF LAW.

TUCKER, in his work on the Constitution, Volume 2, Section 390, page 868, attempts to define what is meant by due process of law. He there says:

> "What then is due process of law referred to in this section of the Amendment? Whatever in the regular administration of law in a state is *general* and *impartial* in its operation on *all* persons, is due process."

Our contention is—

First. That this statute deprives the plaintiff in error, and others, of their property and liberty, without due process of law.

Second. That it denies to persons making contracts for life insurance, the equal protection of the laws.

If it does either, it must be held to be inhibited by the Constitution, and therefore void, unless it can be justified on the ground that it is a proper exercise of the police power of the legislature.

We shall discuss these two phases of the constitutional inhibition together, because the cases and authorities in which these questions have been raised, are in many instances applicable to both propositions.

An examination of the statute in question, as already pointed out, will disclose that the *insurer* is bound by a different rule of law from the *assured* in a life insurance contract in the State of Ohio. The party assured may rescind the contract, and avoid the policy, by showing either mistake, or misrepresentation or an ordinary case of fraud, and he is only required to show that there was a mistake, or that the insurer misrepresented the facts, either wantonly or recklessly. In other words, the assured may avoid the policy, if he so desires, by showing that the insurer, even without knowledge of the falsity of his representations made a false representation, which the parties agreed should be material to the contract, or which of itself would be material.

This is the very point decided in the case of *Insurance Company* v. *Pyle*, 44 Ohio State, 19. The Court say in the first paragraph of the syllabus:

> "The provisions of a life insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void *ab initio*, by the terms of the same, and the failure of warranty."

In that case, Mr. Pyle, the assured, rescinded the contract, and sued the company to recover the amount of premiums paid, and he was allowed to recover. He may even recover,

as he did in that case, where the fraud or mistake, or the representation which was made a warranty, was his own warranty or his own misrepresentation.

The statute in question, in no way changes *his* rights in this particular. He still may avoid the policy upon the same grounds, while the insurer is compelled to prove all the conditions pointed out above, even before he can introduce a part of his evidence. The insurance company would be required, in such a case, first, to clearly prove that the answers in the application were not only false, but were willfully false and fraudulently made, even before it could introduce in evidence, the application upon which the insurance was obtained. Not only that, but it must go farther, and prove to the satisfaction of a Court or a jury, unhampered or unrestricted by any rule of law, that the answer was material, even though the contract expressly provided that it should be material. In addition to that, it is required to go further, and show that the false answer induced the company to issue the policy, and that it would not have been issued but for that false answer; and moreover, that neither the company nor its agent had any knowledge of the fraud or misrepresentation; while under the rules of law, the assured may simply show by a preponderance of the evidence that the representations made by the company were false, and he may thereby avoid the policy, and recover back his premiums paid. No matter whether the company had knowledge of the falsity of the representation, or not, he can avoid the policy, and if the terms of the contract make any representation a warranty, and provide that it is material as between the parties, under the Ohio Statute, the assured can come in and avoid the policy, and recover back the premiums paid, if he shows that there was even the slightest or most techni-

cal violation of the representation which was made a warranty. In other words, under the Ohio statute, the assured may avoid or enforce the contract at his pleasure upon the breach of a warranty, or upon a false representation, and he is only required to establish either by the ordinary rules of evidence. That is, the assured may rescind or enforce the contract at his option, although he has perpetrated the fraud which viciates the contract, while the insurer can neither enforce nor rescind the contract, although his dealings are fair, honorable and just, even above the suspicion of fraud. Certainly this is not equality before the law.

The statute meets the insurer at the door of the Temple of Justice with the burden and the handicap that he must make out a case of fraud by the most unusual and stringent rules of proof, and even then he is not permitted to take advantage of the fraud that he has clearly proved, until he proves and establishes clearly the other conditions of the statute pointed out; while upon the other hand, it says to the assured, "You may enter the Court and avoid this contract in the same manner and under the same rules of proof that anybody else in the State of Ohio can avoid any other contract, by simply showing a breach of warranty or a misrepresentation whether it was willfully made, or not."

As we have already pointed out, the Supreme Court of Ohio has decided that one of the parties may avoid the contract where a material fact has been misrepresented, even though the party making the misrepresentation, believed that the representation was true when he made it, and had good grounds for so believing.

Mulvey v. *King*, 39 O. S., 491.

Irwin v. *Wilson*, 45 O. S., 436–437.

It is certainly apparent that under the Ohio statute, the insurer is deprived of the rights and remedies conceded to the assured. This, the legislature has no power to do. When it denies the equal protection of the laws to the insurer, it is depriving him of a constitutional privilege, and when it has deprived him of the same rights and remedies in the Courts that are conceded to other litigants, and when it meets him at the door of justice with the declaration that "You shall not be permitted to make a warranty upon your part, while the party with whom you are contracting may make a warranty, and enforce it," it is not only discriminating and refusing equal justice, but it is clearly and unmistakably depriving the insurer of the right and liberty to freely contract about a subject that is not prohibited by law, because, forsooth, the other party to the contract, can make the very contract which the law prohibits the insurer from making in the contract between them.

Upon this phase of the law, we desire to call attention to a few recent decisions of this Court.

In *Gulf, Colorado & Santa Fe Railroad Company* v. *Ellis*, 165 U. S., 150, a statute passed by the Legislature of Texas was challenged on the same ground as the statute now in question.

The Court in this case, state the following proposition of law in the syllabus:

> "The Act of the Legislature of Texas of April 5th, 1889, which provides that 'any person in this State, having a valid *bona fide* claim for personal services rendered, or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where said stock was killed or injured, against any railway corporation

operating a railroad in this state, and the amount of such claim does not exceed $50, may present the same verified by his affidavit for payment, to such corporation, by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such Court, or any Court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto, all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10 to be assessed and awarded by the Court or jury trying the issue,' *operates to deprive the railroad companies of property, without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit.*"

Judge BREWER, in delivering the opinion of the Court on page 153, in discussing this statute, says:

"The Supreme Court of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations."

The same is true of the Ohio Statute. Not even other insurance companies, doing the various classes of insurance business that is done in the State of Ohio, are subject to this rule of law, and even the assured himself is not bound by it.

The Judge continues—

"The Act singles out a certain class of debtors, and punishes them, when for like delinquencies, it punishes

no others. They are not treated as other debtors, or equally with other debtors. They can not appeal to the Courts as other litigants under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. *They do not enter the Courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong.* In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equally before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

The fact that the plaintiff in error, or others who are affected by this statute, may be corporations, in no way changes this rule of law.

Judge BREWER in delivering the opinion of the Court in the case cited above, on page 154 of the opinion, clearly settles this question. It is there said:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States."

Santa Clara County v. *So. Pacific R. R. Co.*, 118 U. S., 394.
Pembina Mining Company v. *Pennsylvania*, 125 U. S., 181–189.
Mo. Pacific Railway v. *Mackey*, 127 U. S., 205.
Minn. & St. Louis Ry. v. *Herrick*, 127 U. S., 210.
Minn. & St. Louis Ry. v. *Beckwith*, 129 U. S., 26.
Charlotte & Columbia R. R. v. *Gibbs*, 142 U. S., 386.
Covington & Lexington Turnpike Co. v. *Sanford*, 164 U. S., 578.

"The rights and securities guaranteed to persons by that instrument, cannot be disregarded in respect to

these artificial entities called corporations, any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. *A state has no more power to deny to corporations the equal protection of the law, than it has to individual citizens.*"

In *Lake Shore & Michigan Southern Railway Company* v. *Smith*, 173 U. S., 684, the Court say in the first paragraph of the syllabus:

"The provision in the act of the Legislature of Michigan, No. 90, of the year 1891, amending the general railroad law, that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this state or carrying on business partly within and partly without the limits of the state, at a price not exceeding twenty dollars for the lower peninsula, and twenty-five dollars in the upper peninsula; that such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser, they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company; that each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used, is a violation of that part of the Constitution of the United States, which forbids the taking of property without due process of law, and requires the equal protection of the laws."

Mr. Justice PECKHAM, in delivering the opinion of the Court in this case, after stating that this Court had recognized the power of a state to legislate regarding the affairs of railroad companies, and to a certain extent to regulate and control them, on page 689 of the opinion, says:

> "This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a state directly and plainly violates a provision of the Constitution of the United States, such legislation would be void."

And on page 690, he says:

> "Assuming that the state is not controlled by contract between itself and the railroad company, the question is, how far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers. *It has no right even under such circumstances to take away or destroy the property or annul the contracts of a railroad company with third persons.*"

Citing authorities.

> "* * * * A corporation is a person within the protection of the 14th amendment.
>
> *Minn. & St. Louis Ry.* v. *Beckwith*, 129 U. S., 26.
> *Smythe* v. *Ames*, 169 U. S., 466–522, 526."
>
> "*Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property.*"

It was argued in that case that the railroad company accepted its charter, subject to the power of the state to regulate and control its business, and that the fixing of the rate of the thousand mile tickets, was but an exercise of that power.

In answer to this argument, Mr. Justice PECKHAM, on page 698 of the report, says:

> "The power to enact legislation of this character can not be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation, either by confiscation, or indirectly by other means. The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers, or others exercising a calling and using their property in a manner in which the public have an interest.
>
> "In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. *It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment should be carried at a less expense than the other members of the community.*"

The discrimination in the Ohio Statute is certainly as marked and distinct as the one which Mr. Justice PECKHAM was then discussing. The Ohio Statute not only singles out the insurer in a particular kind or class of insurance, and imposes upon him a burden and a rule of law not required or enforced in any other class of contracts, or any other class of business, not even with other kinds of insurance, but it says to the other party to the contract—"You are not required to establish your case by the same rules of evidence and the same rules of law that are enforced against the insurer."

Upon this phase of the case, we desire to call attention to what is said by Mr. Justice HARLAN, in his dissenting opinion in the case of *Atchison, Topeka, etc. Railroad* v. *Matthews*, 174 U. S., 96–124. After pointing out the inequality in the statute under consideration, he says:

> "May the state meet the railroad corporation at the doors of its courts of justice and say to it, 'If you enter here for the purpose of defending the suit brought against you it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful?' Nothing has ever heretofore fallen from this Court sustaining the proposition that the constitutional pledge of the equal protection of the laws admitted of a litigant, because of its corporate character, being denied in a court of justice privileges of a substantial kind *accorded to its opponent. If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice—a principle which I had supposed was as old as Magna Charta.*"

In the case at bar, the Ohio statute meets the insurer at the doors of the court, with the remarkable statement that "you, the insurer, must establish your case by one rule of evidence, and according to one rule of law, while your opponent, the assured, may establish his case by an entirely different rule of law, imposing none of the conditions on the assured that are placed upon the insurer. The assured may make a warranty, and the company must literally keep it. The insurer can make none. The assured may prove fraud the same as any other party to a contract, but note the conditions imposed upon the insurer. In prohibiting insurance companies from making a warranty, the statute is clearly in violation of the Fourteenth Amendment, because it interferes with property rights and the liberty and right to con-

tract, and cannot in any way be sustained, unless it be upon the ground that it is a proper police regulation. We shall examine this proposition later on.

In *Allgeyer* v. *Louisiana*, 165 U. S., 578, the Court say in the first paragraph of the syllabus:

> "The provision in Act No. 66 of the Louisiana Laws of 1894, that any person, firm or corporation, * * * who in any manner whatever does an act in the state to effect, for himself or for another, insurance on property then in that state, in any marine insurance company, which has not complied in all respects with the laws of the state, shall be subject to a fine, etc., when applied to a contract of insurance made in the State of New York, with an insurance company of that state, where the premiums were paid, and where the losses were to be paid, is a violation of the Constitution of the United States."

Mr. Justice PECKHAM, in delivering the opinion of the Court, on page 589, says:

> "As so construed, we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty, without due process of law. *The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union.* The liberty mentioned in that amendment, means not only the right of the citizens to be free from the mere *physical* restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, *and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

As already pointed out, the Ohio statute provides for one law to control the insurer and for another to control the assured. It prevents and prohibits the insurer from making a contract of warranty; it denies to him the same rights and privileges in courts of justice that are accorded to the assured, and to all other persons.

In the case of *Yick Wo* v. *Hopkins*, 118 U. S., 356, Mr. Justice MATTHEWS, in delivering the opinion of the Court, in discussing the Fourteenth Amendment to the Constitution, and the rights guaranteed thereunder, on page 369 of the opinion, says:

> "The equal protection of the laws is a pledge of the protection of equal laws."

We desire to call attention to what is said by Mr. Justice MATTHEWS, in the quotation from *Barbier* v. *Connolly*, 113 U. S., 27.

In the case referred to above, by Mr. Justice MATTHEWS, Mr. Justice FIELD, in delivering the opinion of the Court, on page 31, says:

> "The Fourteenth Amendment in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts.*"

In *State* v. *Goodwill*, 33 W. Va., 179, the questions which we are now raising are clearly discussed. The Court say, in the first paragraph of the syllabus:

> "It is not competent for the legislature, under the Constitution, to single out owners and operators of mines and manufacturers of every kind, and provide that they should bear burdens not imposed on other owners of property or employers of labor and *prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power.*"

An examination of this case will disclose that it was an act of the legislature which attempted to prevent certain mine owners or operators and manufacturers from paying their laborers with orders or script, or in any other manner than the one pointed out by that statute. In other words, it abridged their right to freely contract with each other—not any more so, however, than does the Ohio Statute. The Ohio Statute prevents an honest man from having the benefit of telling the truth when he procures a policy of insurance on his life, because it prevents people who are carrying on the business of insuring the lives of others, from protecting themselves against the fraud of the insured. *It puts a premium upon dishonesty, and makes the honest man pay it.* It allows a dishonest man to commit a fraud upon an insurance company, in obtaining insurance, against which the company cannot defend, and against which it cannot protect itself by a warranty. The only way in which it can protect itself, is by increasing the rate of insurance, so that it can pay all policies issued whether they be procured by fraud, or not, thus increasing the rate to men who are willing to tell the truth, and to warrant that their representations are true.

Judge SNYDER, in discussing this phase of the act passed by the Legislature of West Virginia, although the law was

directed only against the employers of labor, held as we contend here, that it affected the laborer as well as the employer.

We insist that the Ohio Act now in question, is just as much an interference with the liberties and rights of the assured, as it is with the rights and liberty of the insurer. In other words, it prevents the assured from obtaining the best and most advantageous contract, by prohibiting the company from enforcing a warranty which the truthful man is willing to give as to his representations, thereby increasing the rate which must be charged for insurance, and depriving him of any other advantage which he might obtain, if the company were permitted to make and rely upon the warranty in the contract with him.

On this phase of the case, Judge SNYDER, on page 183 in the case last cited, says:

> "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, *for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses.* A person living under the protection of this government, has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue, and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. The

enjoyment or deprivation of these rights and privileges, constitutes the essential distinction between freedom and slavery; between liberty and oppression."

On page 184, he says:

"The right to use, buy and sell property, and contract in respect thereto including contracts for labor—which is, as we have seen, property—is protected by the Constitution. *If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades and regulate all contracts.*"

It must be borne in mind that the Ohio Statute interferes as substantially and as materially with the rights and liberties of the assured, or persons seeking to obtain insurance upon their lives, as it does with persons who are willing to insure them, because it deprives them too, of the right to warrant their representations to the insurer, and thereby obtaining the benefit of such a provision.

The language of Judge SNYDER, in *State* v. *Goodwill*, although applied to laborers, we think has equal force in the case at bar."

In *Godcharles* v. *Wigeman*, 113 Pa. St., 431, the Supreme Court of Pennsylvania was considering an act of the legislature of that state passed for the alleged purpose of regulating and controling the employment of laborers, and their contracts with their employers.

Mr. Justice GORDON, in delivering the opinion of the Court on page 437, says:

"The first, second, third and fourth sections of the act of June 29th, 1881, *are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country can not be done; that is,*

prevent persons who are sui juries from making their own contracts. The act is an infringement alike of the rights of the employer and the employe. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. *He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing, is an infringement of his constitutional privileges and consequently vicious and void.*"

While the Courts in these cases were discussing legislation pertaining to contracts between employer and employe, the principle must be the same, because as is well stated by the Court of Appeals of New York, *in re Jacobs*, 98 N. Y., 98, "*Such legislation may to-day invade one class of rights, and tomorrow another.*"

Judge EARLE, in delivering the opinion of the Court in that case, on page 114, says:

"Such legislation may invade one class of rights to-day, and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, the governmental ordinances regulated the movements and labor of artisans, rate of wages, the price of food, the diet and clothing of people, and a large range of other affairs long since in all civil lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one."

In *State* v. *Loomis et al.*, 115 Mo., 307, the Court state the following proposition of law in the syllabus:

> "Sections 7058 and 7060, Revised Statutes of 1889, making it a misdemeanor for any corporation, person or firm engaged 'in manufacturing or mining,' to issue in payment of the wages of its laborers any order, check, memorandum, token or evidence of indebtedness, payable otherwise than in lawful money of the United States, unless the same is negotiable and redeemable at its face value in cash or in goods or supplies at the option of the holder, at the store or other place of business of the corporation, person or firm, is class legislation, and as such is violative of the constitutional guaranty of 'due process of law,' and void."

Judge BLACK, in delivering the opinion of the Court in this case, after defining and citing authorities to establish what is meant by due process of law, on page 313 of the opinion, says:

> "From the foregoing descriptions and definitions of 'due process of law' or its equivalent the 'law of the land,' it must be evident that this constitutional safeguard condemns arbitrary, unequal, partial legislation; and it is equally clear that the right to make contracts, and have them enforced, as others may, is one of the rights so secured to every citizen."

In the case at bar it will be observed that the statute discriminates between parties to the same contract. The insurer is required to establish fraud by one class of evidence, and is entitled to a rescission of a contract under one rule of law, and the assured under another and a different rule. The insurer cannot make a warranty, while the assured may make a warranty, and have the courts enforce it in the same contract. *The insurer is bound to offer more evidence under the statute, than is required of the assured, to prove the same fact.* That is, the assured may make a case for rescission upon the

ordinary proof of fraud, while the insurer has to comply with all the provisions in the statute.

Judge BLACK, in discussing the case cited above, on page 315, says:

> "It will not do to say these sections simply regulate the payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits, the right to make and enforce the most ordinary every day contracts—a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract."

This is certainly true in the case at bar. The Judge continues in the following language:

> "Now it may be that instances of oppression have occurred and will occur on the part of some mine owners and manufacturers, but do they not occur quite as frequently in other fields of labor? *Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce every day contracts.*
>
> "*Liberty, as we have seen, includes the right to contract as others may; and to take that right away from a class of persons following lawful pursuits, is simply depriving such persons of a time honored right, which the Constitution undertakes to secure to every citizen.*"

In the case of *State* v. *Julow*, 129 Mo., 163, the Court say, in the first paragraph of the syllabus:

> "The constitutional guarantee of the enjoyment of life, liberty and property carries with it as its natural and necessary coincident, all that effectuates and renders complete the full unrestrained enjoyment of the right guaranteed.

"2. The constitutional guarantee of the enjoyment of the right of property, includes the right to acquire property by labor and by contract and of terminating a contract at pleasure, being civilly liable for any unwarranted termination.

"3. *Depriving an owner of property of one of its essential attributes, is depriving him of his property, within the meaning of the constitutional provision that no person shall be deprived of life, liberty or property, without due process of law.*"

We desire to call especial attention to what is said by SHERWOOD, Judge, in delivering the opinion of the Court, on page 175 of the opinion, and to the cases there cited in support of the conclusions arrived at by the Court.

In *Gilman* v. *Tucker*, 128 N. Y., 190, the Court of Appeals of New York say, in the first paragraph of the syllabus:

> "The legislature has no power to deny for any cause to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief; *the denial of a remedy for the wrong inflicted, deprives him of property as effectually as if it had been taken from him by direct legislative enactment.*"

This is certainly true in the case at bar. The statute prevents the insurer from establishing his case by the ordinary rule of proof applicable in other cases, and calls upon him for, and compels him to produce more evidence than the assured, the other party to the same contract, is required to furnish, to establish his case. In other words, it deprives him of the ordinary remedy open to all others who seek to avoid a contract on the ground of fraud.

In *Frorer et al.* v. *The People*, 141 Ill., page 171, Justice SCOFIELD, in discussing the constitutionality of what is known as the Truck Store Act, an act intended to provide for the payment of wages in money, and to prohibit the truck sys-

tem, which act was held by the Supreme Court of Illinois to be unconstitutional, on page 180 of the opinion, says:

> "*The same act, in substance and in principle, if done by the one, is lawful; but if done by the other, is not only unlawful, but a misdemeanor, punishable by fine.* If the General Assembly may thus deprive some persons of substantial privileges allowed to other persons under precisely the same conditions, *it is manifest that it may, upon like principle, deprive still other persons of their privileges in contracting, which, under precisely the same circumstances, are enjoyed by all but the prohibited class.*"

This is exactly what the Ohio statute attempts to do. It deprives the insurer in a life insurance contract of the protection of the law against fraud, conceded to every other individual or person in the State, and even conceded in the very contract by which the insurance was obtained, to the assured. No more flagrant discrimination has ever been exhibited by any statute to which our attention has been called.

Mr. Justice SCOFIELD further continues on the same page, as follows:

> "And it can hardly be admissible that the legislative determination that the facts are such as to warrant this discrimination, is conclusive—for that would make the General Assembly omnipotent—since, if that were so, there could be nothing but its own discretion to control its action in regard to every liberty enjoyed by the citizen; and it might find that the public welfare required that society should be divided into an indefinite number of classes, each possessing or being denied privileges in contracting and acquiring property, as favoritism or caprice might dictate.
>
> "*The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.*"

In *The Board of Education* vs. *Blodgett*, 155 Illinois, 441, the Court say, in the fourth paragraph of the syllabus:

> "Constitutional law. Deprivation of remedy is deprivation of the right it vindicates. *Deprivation of a remedy is equivalent to the deprivation of the right which it is intended to vindicate, unless another remedy exists, or is substituted for that which is taken away.*"
>
> "5. *A right of defense is a remedy of the defendant within the constitutional protection of rights.*"

In *Park* v. *Free Press Company*, 72 Michigan, 560, the Supreme Court of Michigan held that an act which changed a rule of damages in a libel suit, purporting to confine the recovery in cases against newspapers to what the statute designated actual damages, and then defined actual damages to cover only direct pecuniary loss in certain specified ways and none other, was an unauthorized act of the legislature, and was unconstitutional and void. The Court say, in the first paragraph of the syllabus:

> "An act No. 233, Laws of 1885, as amended by act No. 139, Laws of 1887, limiting the recovery in suits brought for libel in certain cases to actual damages, as defined in said act, is not within the power of constitutional legislation."

The principles for which we contend in the case at bar have been fully recognized and announced in many decisions of the Supreme Court of the United States and other Courts. In addition to the authorities we have specifically pointed out we cite the following, as cases in which these principles have been fully recognized and announced:

Yick Wo v. *Hopkins*, 118 U. S., 356.

Slaughter House Cases, 16 Wallace, 36.

Butchers' Union Company v. *Crescent City, Etc., Co.*, 111 U. S., 746.

State v. *Scougal*, 3 So. Dak., 55.
Low v. *Rees Printing Co.*, 41 Neb., 127.
Van Zandt v. *Waddell*, 2 Yerger, 260–270.
Wilder v. *Chicago & West Michigan Ry. Co.*, 70 Mich., 382–4.
State v. *Fire Creek Coal & Coke Co.*, 33 W. Va., 188.
Millett v. *People*, 117 Ill., 294.
Braceville Coal Co. v. *People*, 147 Ill., 66.

These authorities, and many others which may be cited to same effect, conclusively show that the statute under consideration radically and viciously interferes with liberty and property rights, and abridges the constitutional privileges of all persons engaged in writing contracts of insurance in the State of Ohio. As already indicated, the Supreme Court of Ohio, prior to the passage of this act, recognized and promulgated the doctrine which is well nigh universal, that where parties to contracts agree that certain representations shall be material, the Court must treat them as material, and the materiality is no longer open to question. They also recognized and enforced the well established rule, that where parties to contracts made certain representations warranties, that a breach of the warranty obviated or terminated the contract where such defenses are made.

MATERIALITY OF REPRESENTATION—WARRANTIES.

Before closing our discussion of this phase of the case, we desire to briefly call attention to a few well considered cases upon this point, because we believe that an examination of these cases will clearly show the rights of the plaintiff in error, and others, which have been abridged and abrogated by this statute.

In *Jeffries* v. *Life Insurance Company*, 22 Wall., 47, the Court say in the syllabus:

"Where a policy of life insurance contains the following conditions, to-wit., 'This policy is issued by the company and accepted by the assured on the following express conditions and agreements which are a part of the contract of insurance:

"'*First.*—That the statements and declarations made in the application for said policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the assured, affecting the interest of the company.'

"And the further condition:

"'That in case of the violation of the foregoing condition * * * this policy shall become null and void' any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given to the risk."

Justice HUNT, in delivering the opinion of the Court in this case, on page 53, says:

"*There is no place for the argument, either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.* It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. * * * The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. *The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.*"

Further on in the same opinion he says:

"*It would be a violation of the legal rights of the company to take from it its acknowledged power thus to make its opinion the standard of what is material and to leave that point to the determination of the jury.*"

And yet this is the very thing, among others, which the Ohio Statute requires, and which was done in the case at bar.

Justice HUNT further on, in discussing the same subject, says:

> "*Whether a question is material depends upon the question itself. The information received may be immaterial, but if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial.*"

This language has peculiar application to the case at bar. It was stated by the medical examiner of the plaintiff in error, as the record in this case discloses, that had the decedent, the assured, not misled and deceived the company by stating that he was not afflicted with gonorrhea or stricture, which the undisputed evidence showed he did have, that they would not have taken the risk, because there was a moral hazard, in addition to the effect of the disease upon the constitution and the health of the party insured; but the company, under the statute in question, was deprived of the benefits of the rules of law set forth in these decisions.

Mr. Justice HUNT, further on in the opinion, says:

> "Insurance companies sometimes insist that individuals largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comforts upon their families."
>
> "The juror would be likely to repudiate such a theory on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong; *but the company has expressly provided that their judgment, and not the judgment of the juror shall govern. Their right thus to contract and the duty of the Court to give effect to such contracts, can not be denied.*"

And yet this is one of the very things which the Ohio Statute does deny to the plaintiff in error and others writing insurance in the state of Ohio.

The contract for the insurance sued upon in the case at bar, contained the following stipulation:

> "I hereby warrant that all the statements and answers made by me above are complete and true, and I agree that * * * if said policy be issued, this application, with answers made to the Medical Examiner, shall be made a part thereof."

The undisputed evidence in the case shows that the applicant for insurance falsely answered more than one question. Question 11*a* of the application, as already pointed out, was:

> "Have you been obliged to consult a doctor at any time during the last ten years? If so, when and for what? *A.* 1893. Malarial fever, one week's duration."

The record shows, and there is no dispute about the fact, that the applicant for insurance had other diseases as we have already pointed out, so that had it not been for the effect given to Section 3625 of the Statutes, by the trial Court, it must have instructed the jury to return a verdict for the plaintiff in error.

In *Aetna Life Insurance Company* v. *France, et al.*, 91 U. S., 510, the Court lay down the following proposition of law in the syllabus:

> "*The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should avoid the policy, removes the question of materiality from the consideration of the Court or jury.*"

In *American Credit Indemnity Company* v. *Carrollton Furniture Company*, 95 Fed. Rep., 111, the Circuit Court of Appeals for the Second Circuit, state the following proposition of law in the first paragraph of the syllabus:

> "*Where there is a distinct agreement that an application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are to be treated as such, and not merely representations, and must be strictly true, or the policy will not take effect.*"

Judge SHIPMAN, in delivering the opinion of the Court in this case, on page 113, says:

> "Where the assertions or representations upon which the contract is declared to be based, are warranties, they must be 'strictly true or the policy will not take effect; and this is so whether the thing warranted be material to the risk, or not. *It would perhaps be more proper to say that the parties have agreed upon the materiality of the thing warranted, and that the agreement precludes all inquiry into the subject.*' *Burritt* v. *Insurance Company, supra.* This terse statement of Judge BRONSON has been often repeated in various modes of expression, but to the same effect."
>
> "*Jeffries* v. *Insurance Company*, 22 Wall., 47.
> *Insurance Company* v. *France*, 91 U. S., 510, and the cases previously cited."

In *Imperial Fire Insurance Company* v. *Coos County*, 151 U. S., 452, the Court say, in the syllabus:

> "A policy of fire insurance containing a provision that it should become void if, without notice to the company and its permission indorsed thereon 'mechanics are employed in building, altering or repairing' insured premises becomes void by the employment of mechanics in so building, altering or repairing; and the insurer is not responsible to the assured for damage or injury to the assured premises thereafter by fire, although not happening in consequence of the alteration and repairs."

Mr. Justice JACKSON, in delivering the opinion of the Court in this case, on page 462, says:

> "*Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties.* * * * The

compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover.

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. *It is enough that the parties have made certain terms conditions on which their contracts shall continue or terminate. The courts may not make a contract for the parties.*"

In *Metropolitan Insurance Company* v. *Rutherford*, 35 S. E., 361, decided by the Supreme Court of Virginia, on March 15th, 1900, the Court state the following proposition of law in the second paragraph of the syllabus:

"*When by the terms of a policy, answers to the questions in the application are made warranties, the validity of the policy depends on the literal truth of the answers, it being of no consequence whether they are material to the risk, or not.*"

In *Phœnix Life Insurance Company* v. *Raddin*, 120 U. S., 183, Mr. Justice GRAY, in delivering the opinion of the Court, after discussing the effect of representations and agreements that are material, on page 189, says:

"The misrepresentation or concealment by the assured of any material fact, entitles the insurers to avoid the policy. *But the parties may by their contract, make material a fact that would otherwise be immaterial or make immaterial a fact that would otherwise be material.*"

In *Virginia F. & M. Insurance Company* v. *Morgan*, 90 Va., 290, the Court say, in the first paragraph of the syllabus:

"Insurance—Warranties. A warranty is an agreement in the nature of a condition precedent and *like that must be strictly complied with, whether material, or not.*"

We call especial attention to what is said by LEWIS, Judge, in delivering the opinion of the Court, on page 293, in this case, and to the authorities there cited.

This law was recognized and enforced by the Supreme Court of Ohio, prior to the passage of Section 3625. This is clearly shown by the decision of the Court in the case of *Insurance Company* v. *Pyle*, 44 Ohio State, 19, to which we have already referred. But we desire to call attention to the opinion of the Court, as delivered by FOLLETT, Judge, on page 30 of the opinion, where the case of *Jeffries* v. *Life Insurance Company*, 22 Wall., 47, and *Ætna Life Insurance Company* v. *France*, 91 U. S., 510, are cited and followed.

The Supreme Court of Ohio, in the case at bar, clearly recognized that this was the law in Ohio prior to the passage of the statute now in question, and it is still the law in Ohio in regard to all other contracts except life insurance contracts, and it is even the law in Ohio with reference to life insurance contracts, so far as it applies to the party assured, because there is nothing to prevent the party assured from taking advantage of these decisions and of this law even at this time, although the insurer is debarred of these privileges and deprived of his rights by Section 3625 of the Revised Statutes of Ohio.

The Supreme Court of Ohio held in its opinion in the decision of the case at bar, that—

> "The case of *Insurance Company* v. *Pyle*, 44 Ohio State, 19, was decided before this section was enacted, and therefore cannot control the matter. This section was passed for the purpose of abrogating the rule laid down in that case."
>
> *John Hancock Mutual Life Insurance Company* v. *Warren*, 59 O. S., 53.

Here then is a clear recognition by the Supreme Court of Ohio, of the fact that the law in question did take away the property rights of the plaintiff in error and others, doing life insurance business in the State of Ohio, *because it deprived them of the right to contract in their policies of insurance, as to what should be material representations in the application for insurance, and it further deprived them of the right to make warranties in this class of contracts. This was done in addition to the other requirements imposed upon the insurer by this statute.*

We maintain, therefore, that the foregoing authorities conclusively establish the proposition that the section of the statute in question deprives the plaintiff in error, and others, of their property without due process of law, and places them unequally before the law, and is odious, obnoxious and arbitrary class legislation, and that unless such legislation is necessary to protect the health, safety or public morals of the State, it must be declared void, because it is in contravention of the fourteenth amendment to the Constitution of the United States. In other words, unless it is such legislation as may be enacted under the police power of the legislature, it cannot stand for a minute, because it is an unwarranted interference with the liberty, property and equality of all persons attempting to procure, or buy, or sell, or write or obtain life insurance in the State of Ohio.

POLICE POWER.

It has been argued below that the legislature had a right to classify the business of life insurance, and thus regulate it under the power vested in the General Assembly as being a proper subject for police regulation. Upon this phase of the case we desire to call especial attention to what is said by the Court in the last paragraph of the syllabus in the case of

The Gulf, Colorado and Santa Fe Railway Company v. *Ellis*, 165 U. S., 150:

> "*The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.*"

Mr. Justice BREWER, in delivering the opinion of the Court in this case, on page 159, says:

> "Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. *Unless the legislature may arbitrarily select one corporation, or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquencies, this statute cannot be sustained.*"

It seems to us that this is the situation in the case at bar. As already indicated, even the assured, in the very contract sued on, is not subjected to the penalties of this law.

Mr. Justice BREWER further continues:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court in *Yick Wo* v. *Hopkins*, 118 U. S., 368, 369: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest and review the history

of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. *No duty rests more imperatively upon the Courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government.*"

We desire to call especial attention to the authorities cited in the opinion by Mr. Justice BREWER in this case.

In *Lake Shore, etc., Railway Company* v. *Smith*, 173 U. S., 684, the Court, after holding that the act providing for thousand mile tickets, passed by the legislature of Michigan, which was then under consideration, was in violation of the Fourteenth Amendment to the Constitution, because it operated to take the property of the railroad company without due process of law, and denied to persons affected by it the equal protection of the laws, and after considering the question as to whether such legislation comes within the police power of the legislature, in the last paragraph of the syllabus, says:

"*In so holding the Court is not thereby interfering with the power of the legislature over railroads, as corporations or common carriers, to so legislate as to fix maximim rates, to*

prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public; but it only says that the particular legislation in review in this case does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated."

It seems to us that the principles there recognized are applicable to the case at bar. The legislature of Ohio no doubt had power to pass laws, controlling and regulating the subject of insurance within proper constitutional grounds and limitations, but as is well said by Mr. Justice PECKHAM, in delivering the opinion of the Court cited above, on page 689:

"*This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation will be void.*"

It certainly will not be argued or claimed that the legislature has any more power over insurance companies than it has over railroad companies. Indeed, we assume that there are many more reasons why this regulative control should be exercised over a quasi public corporation, like a railroad corporation, than over a purely private business, like the business of life insurance. And, as is well stated by Mr. Justice PECKHAM, on page 690 of the opinion in the case above cited.

"*Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property.*"

It cannot be said that the legislature of a State has the right or the power to decide or declare what shall be the public policy of the State, and what are proper subjects of police regulation.

This question is clearly met by the opinion in the case cited above, in the following language of Justice PECKHAM, to be found on page 697 of the opinion, where he says:

> "*The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not, is not a matter of policy to be decided by the legislature.*"

And on page 698, it is said:

> "The power to enact legislation of this character can not be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation, either by confiscation or indirectly by other means."

And the opinion in this case was concluded in the following clear, strong and terse statement:

> "It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the person spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community, and there is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason."

And it was held in that case that the legislature had no such power, and that its decision was not binding upon the Courts, and that the Courts must determine those questions for themselves.

It seems to us that the concluding statement quoted above, is peculiarly applicable to the case at bar, because the legislation in question is a bold, bald and most unusual and arbitrary discrimination against one particular class of insurance, and extends only to one party to the contract.

In *Lawton* v. *Steele*, 152 U. S., 133. Mr. Justice BROWN, in delivering the opinion of the Court on page 137, clearly points out what is meant by the police powers of the legislature. It is there said:

> *"To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."*

It seems to us that there can be no public policy which necessitates a law which protects men for lying or for perpetrating fraud. A contract to secure insurance on one's life is not only lawful, but is indeed commendable, and the insurer should be protected as well as the assured. He risks his money and his property in a fair and a legitimate enterprise, and his property is as much entitled to the protection of the Constitution as the property of the assured. So long as a contract to insure a life is lawful, an agreement between the parties to the contract warranting the statements in the application or admitting them to be the basis of the contract, certainly cannot be unlawful.

If then, the subject about which the contract is made, is legal, and in no way prohibited by law, the legislature has

no power under the guise of police protection, or any other, to make the contract concerning that subject matter for the parties. It has no power to say to one of the parties to this contract, "You shall be bound by one rule of law in the enforcement of your agreement," and to the other party, "You shall be bound by another and a different rule of law." What the parties, by their contract, have agreed shall be material, the legislature, by its enactment, has no power to say is immaterial, because that would be making a contract for the parties about a subject concerning which the parties had a full right to make their own contracts.

Under the statute in question, when the assured had turned aside inquiry into his past history, and obtained this policy, as he obviously intended to do by falsehood and fraud, this statute allows him to retain the fruits of his fraud, unless the insurance company can show that the questions and answers were such as in the opinion of the jury were material and avoided the policy, while the law of the land permitted the parties in their contracts, to specifically specify and stipulate what should be material and what should be immaterial. The jury had no knowledge of this contract of insurance, neither are they supposed to be insurance experts. What to them might seem the most immaterial inquiry, might to those versed in and familiar with the subject of insurance, be a most vital and pertinent interrogatory. In other words, under the statute the case is to be tried, not on the facts as they were, but on the facts as the jury may think they ought to have been, and the court and jury are thereby authorized to make a new and altogether different contract for the parties. The preamble of Section 3625 of the Revised Statutes of Ohio should have been: "*An Act to protect men who lie for the purpose of unlawfully procuring life insurance.*"

It cannot certainly be claimed that this enactment is for the common welfare and equal protection and benefit of the people. It cannot be detrimental or injurious to the public, for a man making a contract for life insurance to warrant that the statements which he makes in regard to his health and bodily condition, are complete and true. He, above all other persons, is in a position to know the facts in regard to his own health and bodily infirmities. Is there any public policy which forbids his making a truthful statement of these facts to the party who risks its money and its property for his or his family's protection? Surely not.

Does such a statute enlarge or protect the public safety, morals or health of the community by shielding the party making such false statements from the consequences of his own fraud? Under the Ohio law, as pointed out, the assured is not bound by this statute. It only applies to the insurer. The assured may have the policy cancelled and rescinded and obtain the return of his premium by proving an ordinary case of fraud or misrepresentation by the ordinary rules of evidence; while the insurer is bound by this most extraordinary, unreasonable, arbitrary, discriminating statute, we have already referred to.

It would seem to us that public policy forbids such a statute because its direct tendency is to encourage and foster falsehood and deception, and to educate men into the belief that they can take advantage of their own fraud.

Besides the statute is an unreasonable interference with the liberty of the assured. It directly prevents, interferes with and hinders him in making the best possible contract for insurance upon his life when he is willing to tell the truth, and warrant that he is telling the truth. The only way in which the insurers can protect themselves against the statute,

is by increasing the rate, and rejecting all risks where there is any possibility of a doubt, thus depriving persons in Ohio from obtaining the best contracts at the lowest rates for insurance upon their lives, and this too is done at the expense of the honest citizen. It puts a premium upon falsehood and fraud in favor of the party committing them, and compels the honest man to pay it.

Surely this would be a strange and unusual public policy. It deprives those desiring to insure their lives, of liberty and property rights, and at the same time it is unjust discrimination against the insurance company.

Take for example, a mutual life insurance company, organized in the State of Ohio. The members of the company who were willing and were compelled by the laws of common honesty to truthfully represent the facts in regard to their health and character, are compelled to give up their money in the way of assessments, to contribute to the unprincipled and dishonest members, who may, by misrepresentation and fraud, obtain policies of insurance in such a company, and recover upon them under favor of this statute, thereby taking the money and the property of the honest man to swell the coffers of the fraudulent.

The following authorities, it seems to us clearly and conclusively show that this statute cannot be upheld under the guise or favor of the so-called police power of the legislature.

In Tiedeman on Limitation of Police Power, page 290, the author, in discussing the proper limitations of this power, says:

> "*If the business is not inherently harmful, the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner.*"

In *State* v. *Jaloux*, 129 Mo., 163, the Court state the law in the seventh paragraph of the syllabus, in the following language:

> "Legislation. Police regulation. Rights guaranteed to a citizen by the Constitution, cannot be abridged by the legislature under the guise of a police regulation."

SHERWOOD, Judge, in delivering the opinion of the Court, on page 177, says:

> "*The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be mere arbitrary classification, without any basis of reasoning on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do.*"

And yet, we maintain this is just what the legislature of Ohio has attempted to do.

Further on in the opinion, the Judge says:

> "Nor can the statute escape censure by assuming the label of a police regulation. *It has none of the elements or attributes which pertain to such a regulation, for it does not in terms or by implication promote or tend to promote the public health, welfare, comfort or safety; and if it did, the state would not be allowed, under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of a citizen which the Constitution intended to secure against diminution or abridgment. In re Jacobs*, 98 N. Y., 98, and cases cited."

In *ex rel Tyroler* v. *Warden of Prison*, 157 N. Y., 116, the Court of Appeals say, in the syllabus:

> "Chapter 506 of the laws of 1897 (Penal Code, Section 615 and 616), which prohibits and subjects to punishment as a crime, the selling of tickets for passage on

vessels or railroad trains by any persons except common carriers and their specially authorized agents, *transcends the police power and violates the constitutional guarantees of civil rights and privileges and of liberty, in so far as it undertakes to prohibit citizens of the state from engaging in the business of brokerage in passage tickets.*"

PARKER, C. J., in delivering the opinion of the Court in this case, after quoting from the leading cases decided by that Court, as to the power of the legislature to abridge the right and the freedom of the citizen to contract, and to deny to him the equal protection of the law, in discussing the police power and how far it is applicable in such cases, on page 130, after citing, *In re Jacobs*, 98 N. Y., 98; *People* v. *Marx*, 99 N. Y., 377, and *People* v. *Gillson*, 109 N. Y., 389, says:

"In each of the last three cases cited, it was invoked by counsel to sustain a statute, and it received very careful consideration at the hands of this Court. It was held that the power, however broad and extensive, is not above the Constitution, in obedience to the commands of which the Courts will protect the rights of individuals from invasion under the guise of police regulations, when it is manifest that such is not the object and purpose of the regulation; *and while it is the general province of the legislature to determine what laws and regulations are needed to protect the public health, comfort and safety, courts must be able to say, upon perusal of the enactment that there is some fair and reasonable connection between it and the ends above mentioned. Unless such regulation exists, an enactment cannot be upheld as an exercise of the police power.*"

In *Colon* v. *Lisk*, 153 N. Y., 188, MARTIN, Judge, in delivering the opinion of the Court, on page 196–7, in discussing the police power of the legislature, says:

"*It is for the judiciary to see that the purpose to be reached by the law is a public one.* (*Matter of Rees*, 72 N. Y., 1–8.) *Equal rights and impartial tribunals to enforce them*

are the results which are intended to be secured by establishment of constitutional limitations to the legislative power. (*People* v. *Marx*, 99 N. Y., 377–387.) *Under the mere guise of a statute to protect against wrong, the legislature cannot arbitrarily strike down private rights and invade personal freedom or confiscate private property.* The police power must be exercised within its appropriate sphere and by appropriate methods. (*People* v. *Arensberg*, 103 N. Y., 399.) *This power can be exercised only to promote the public good, and is always subject to judicial scrutiny.* (*Forster* v. *Scott*, 136 N. Y., 577–584.) Whenever the legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid and to nullify the legislative attempt to invade citizens's rights. (*People ex rel. Nechamcus* v. *Warden*, 144 N. Y., 529–535.) That power must be exercised subject to the provisions of both the Federal and the State Constitutions. Laws passed in the exercise of it, must tend towards the preservation of the lives, health, morals or welfare of the community, *and the court must be enabled to see some clear and real connection between the assumed purpose of the law, and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power.* (*Health Department* v. *Rector*, 145 N. Y., 32–39.")

In *City of Chicago* v. *Netcher*, 183 Ill., 104, the Court state the following proposition of law in the syllabus:

"3. In order to sustain an ordinance regulating the business of a citizen, which is claimed to have been passed by virtue of police power, *it is necessary that the ordinance tends in some degree to prevent offenses, or preserve or promote the public health, morals, safety or welfare.*

"4. *An attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it, is an unwarrantable interference with constitutional rights, whether such denial is contained in a statute or an ordinance passed under a statute.*"

Mr. Justice CARTWRIGHT, in delivering the opinion of the Court, page 111, in discussing police power of the legislature, says:

> "In order to sustain legislative interference with the business of a citizen, by virtue of the police power, it is necessary that the act should have some reasonable relation to the subject included in such power. If it is claimed that the statute or ordinance is referable to the police power, the Court must be able to see that it tends in some degree toward the prevention of offenses, or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but under the guise of a police regulation is an invasion of the property rights of the individual, it is the duty of the Court to declare it void."

Citing:

Braceville Coal Company v. *People*, 147 Ill., 66.
Eden v. *People*, 161 Ill., 296.

Can it be claimed or argued that permitting a man to tell the truth is subversive of public safety, health or morals? We have already shown, and we think no one will deny it, that the business of insurance is both lawful and commendable, and should be encouraged.

In *State* v. *Goodwill*, 33 W. Va., 179, a case which has been cited under another paragraph of our brief, the Court held that an act prohibiting persons engaged in mining and manufacturing from issuing in payment of labor, any order or paper except such as was specified in the act, was unconstitutional and void, and it was there held that such legislation could not be sustained as an exercise of the police power.

SNYDER, Judge, in delivering the opinion of the Court, after referring to the provisions of the fourteenth amendment to the Constitution, and pointing out that the law was a violation of the property rights guaranteed by that provision of the Constitution, on page 181, says:

> "*Can the legislature, in view of these constitutional guarantees, limit or forbid the right of contract between parties under no mental, corporal or other disability, when the subject of contract is lawful, not public in its character, and the exercise of it is purely private and personal to the parties themselves?*"

It will certainly not be denied that a contract of life insurance is purely a private and personal contract between the insurer and the assured; that it is lawful and that it is not public in its character. The Court in that case, after an able and elaborate discussion of the principle, decided that the legislature had no such power, and on page 185 of the opinion, after discussing the police power of the legislature, it is said that—

> "This power, however broad and extensive, is not above the Constitution, which is the supreme law; and so far as it imposes restraint the police power must be exercised in subordination to it."
>
> *In re Jacobs*, 98 N. Y., 98.
>
> *Mugler* v. *Kansas*, 123 U. S., 623.

> "Generally it is for the legislature to determine what laws and regulations are proper in the exercise of the police power; but if it passes an act ostensibly for the public health or safety, and thereby deprives or takes away the property of a citizen, or interferes with his rights of personal liberty, *then it is for the Courts to determine whether it is a proper and reasonable exercise of the power, and if it is not, to declare it void.*"

And the Court concludes the discussion with the following statement of the law, p. 186:

> "In view of what the Courts have uniformly held in respect to this class of legislation, it is needless to prolong this discussion. It is a species of sumptuary legislation, which has been universally condemned as an attempt to degrade the intelligence, virtue and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, *because it assumes that the employer is a knave and the laborer is an imbecile.*"

The Ohio Statute not only assumes that the insurer is a knave and the assured an imbecile, but it encourages lying and punishes the innocent.

In *Mugler* v. *Kansas*, 123 U. S., 623, Mr. Justice HARLAN, in discussing the police power of the legislature, on page 661, says:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are of necessity, limits beyond which the legislature cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute *Sinking Fund Cases*, 99 U. S., 700–718, the courts must obey the Constitution rather than the law-making department of government, and must upon their own responsibility determine whether in any particular case these limits have been passed. '*To what purpose*' *it was said in Marbury v. Madison*, 1 *Cranch*, 137–176, '*are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended to be restrained?* The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation,' the courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed

> are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, *therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*"

In *Millet* v. *People*, 117 Ill., 294, the Supreme Court of Illinois, in a well considered opinion, held unconstitutional and void an act of the legislature of that state, which required the owners or operators of mines to provide scales for weighing their coal, and make the weight of coal the basis of the wages of the miners.

The Court say, in the fifth paragraph of the syllabus:

> "It is not competent for the legislature, under the Constitution, *to single out owners and operators of coal mines*, and provide *that they shall bear burdens not imposed upon other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make.* Such legislation cannot be sustained as an exercise of the police power."

Mr. Justice SCOFIELD, in delivering the opinion of the Court, in discussing the police power of the legislature as applicable to that act, on page 302, says:

> "What is there in the condition or the situation of the laborer in the mine to disqualify him for contracting in regard to the price of labor, or in regard to the mode of ascertaining the price? And why should the owner of a mine or the agent in control of the mine not be allowed to contract in respect to matters in which all other property owners and agents may contract? Undoubtedly, if these sections fall within the police power, they may be maintained upon that ground; but it is quite obvious

> that they do not. Their requirements have no tendency to insure the personal safety of the miner, or to protect his property or the property of others. They do not meet Dwarris's definition of police regulation. They do not have reference to the comfort, the safety or the welfare of society."

Certainly parties desiring to obtain life insurance are as equally well prepared to look after and care for their interests and rights in a contract as ordinary day laborers in a coal mine. We think it is a fair observation to say that people who obtain insurance on their lives, as a rule, are among the more intelligent, educated and substantial part of the community, and as a rule are professional and business men, who are abundantly able to look after and care for themselves in the making of any contracts.

In *Wally's Heirs* v. *Kennedy*, 2 Yerg., 554, an act authorizing the court to dismiss Indian Reservation cases, where prosecuted for the use of another, was held unconstitutional. The Court, in the opinion, on page 555, says:

> "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, *or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.* Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law, by another."

In *Commonwealth* v. *Perry*, 155 Mass., 117, a similar statute was held unconstitutional. That was an act attempted to be passed for the alleged purpose of protecting weavers against unjust fines for defective work.

KNOWLTON, Judge, in delivering the opinion of the Court, on page 121, says:

> "The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.
>
> "The manufacture of clothing is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it; indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter."

In *State ex rel.* v. *Ashbrook*, 154 Mo., 375, a very recent and well considered case, decided by the Supreme Court of Missouri, February 20, 1900, the Court say in the second paragraph of the syllabus:

> "A legislative act to be sustained as a police measure must in some degree tend to prevent some offense or manifest evil, or have for its aim the preservation of public health, morals, safety or welfare."

Judge ROBINSON, in delivering the opinion of the Court, after stating the proposition of law set forth in the paragraph of the syllabus quoted above, on page 386 of the opinion, says:

> "If no such object is discernible, but the mere guise and masquerade of public control under the name of 'An act to regulate business and trade,' etc., is adopted, that the liberty and property rights of citizens may be invaded, the Courts will strike down the act as unwarranted. Mere legislative assumption of the right to direct and indicate the channel and course into which the private energies of the citizen shall flow, or the attempt to abridge or hamper his right to pursue any lawful calling or avocation which he may choose without any reasonable regulation or molestation, have ever been condemned in all free government."

In *Van Zandt* v. *Waddell*, 2 Yerg., 260, CATRON, Judge, in delivering the opinion, on page 270, uses the exact language already quoted from *Wally's Heirs* v. *Kennedy*, 2 Yerg., 554.

In *State* v. *Dalton*, decided by the Supreme Court of Rhode Island, May 2, 1900, reported in 46 Atlantic, 234, the Court say in the syllabus:

> "Public Laws, Civil, 652, makes a misdemeanor to sell or give a stamp or coupon in connection with the sale of property, which shall entitle the purchaser to receive from some person other than the seller, any article of merchandise other than that actually sold, and for such other person to deliver the extra article of merchandise on presentation of the stamp or coupon. *Held*, that the transaction sought to be prohibited was not a lottery, and its prohibition not in furtherance of the public morals, health or safety, and hence, the act not being a valid exercise of police power, is unconstitutional and void, as unwarrantably depriving the citizen of the liberty guaranteed to him by the Const. U. S., Amend. 14, Sec. 1."

TILLINGHAST, Judge, in delivering the opinion of the Court in this case, after discussing the enactment which was described in the syllabus quoted above, and holding that it was an unwarrantable interference with the property rights of individuals as guaranteed by the Fourteenth Amendment of the Constitution, referring to the right of the legislature to pass such an act under its police power, on page 235, says:

> "We come, then, to the question whether the act before us is one which falls within the police power of the legislature; for if it is not, it is clearly an unlawful interference with private right. We will endeavor to test this question by the simple process of elimination. First, then, does said act look to or in any manner concern the public health? No one claims that it does, and no one could for a moment claim, with any basis of reasoning, that it has or was intended to have even the remotest bearing thereon."

(The same is true of the Ohio Statute in the case at bar.)

"Second.—Does the act look to or tend to promote the public safety? Nothing of this sort either is claimed in its favor, and we fail to see that anything could be, for it bears no relation whatever thereto."

(This is also true of the Ohio act in question.)

"Having thus eliminated two of the general grounds on which said act must be supported as being a valid exercise of the police power, we come to the third and last one, which raises the question whether the act relates to or tends to promote the public morals."

We can not see how the act of the legislature of Ohio can in any way encourage or promote public morals; in fact, it seems to us that it is a direct attack upon even common honesty, because it puts a premium upon lying, and encourages fraud, and educates men to believe that courts of justice may discriminate between litigants in the same case, granting to one privileges and rights, which it may deny to the other under the same circumstances.

It seems to us, as was well said by the Supreme Court of Rhode Island in that case, that the act cannot be sustained as being a valid exercise of the police power of the legislature, and must therefore be held to be unconstitutional and void.

In concluding our discussion of this phase of the case, we desire to call attention to the fact that the act of the legislature of Ohio, is obnoxious class legislation, contrary to the Fourteenth Amendment, and upon this phase of the case, we do not care to do more than cite a few of the well considered cases on this point.

The legislature cannot escape the inhibition of the Fourteenth Amendment, by attempting to classify such legislation, because the classification here attempted is unreasonable and arbitrary, and this is sufficient to condemn it.

In *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S., 151, which has already been cited under another paragraph of our brief, Justice BREWER, in delivering the opinion of the Court, after citing many cases upon the question of classification for legislative purposes, among which are cited—

State v. *Loomis*, 115 Mo., 307-314;

Van Zant v. *Waddell*, 2 Yerg., 260-270;

Dibrell v. *Morris Heirs*, 15 S. W. Rep., 87-95,

on page 157 of the opinion, says:

> "If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corperations are selected to bear this penalty. *The rule of equality is ignored.*
>
> "It may be said that certain corporations are chartered for charitable, educational or religious purposes; an abundant reason for not visiting them with a penalty for the non-payment of debts, is found in the fact that their charter privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations and others like that are exempt. Further, the penalty is imposed, not upon all corporations charged with the *quasi* public duty of transportation, but only upon those charged with a particular form of that duty. So classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such special privileges granted for the discharge of one class of public duties."

It seems to us that this language is in point in the case at bar. It is not even pretended that the legislation in question applies to any person or to any class of contracts, except

contracts for insurance of one's life, and it is purely an arbitrary law, depriving both assured and insurer of property rights guaranteed by the Constitution.

We do not care to discuss the question of classification further than to cite the following authorities, which clearly show that such a classification cannot be upheld:

Gulf, Colorado & Santa Fe Ry. Co. v. *Ellis*, 165 U. S. 150.
Allgeyer v. *Louisiana*, 165 U. S., 578.
Lake Shore & Michigan Ry. Co., 173 U. S., 684-699.
State v. *Loomis*, 115 Mo., 307.
State v. *Julow*, 129 Mo., 163.
Low v. *Reis Printing Co.*, 41 Neb., 127.
State v. *Scougal*, 5 So. Dak., 55.
Brown v. *Ry. Co.*, 87 Ala., 370.
Gilman v. *Tucker*, 128 N. Y., 190.
State v. *Goodwill*, 33 W. Va., 182.
Re Jacobs, 98 N. Y., 98.
Frorer v. *People*, 141 Ill., 171.
Millett v. *People*, 117 Ill., 294.
Chicago v. *Natcher*, 183 Ill., 104-110-111.
People ex rel. v. *Warden of Prison*, 157 N. Y., 116-129-130.
Colon v. *Lisk*, 153 N. Y., 194.
People v. *Marx*, 99 N. Y., 377.
State v. *Fire Creek Coal & Coke Co.*, 33 W. Va., 188.
Eden v. *People*, 161 Ill., 296.
Durkee v. *Janesville*, 28 Wis., 464.
Janesville v. *Carpenter*, 77 Wis. 288.
Clark v. *Free Press Co.*, 77 Mich., 560.
Commonwealth v. *Perry*, 153 Mass., 117.

In view of the authorities cited and commented on above, it would seem unnecessary to further reply to the argument of counsel in the hearing below, or to the opinion of the Supreme Court, and the grounds upon which their decision was based, but in conclusion we desire to briefly make some suggestions in reply to what was said by counsel upon the other side, and some of the reasons offered by the Supreme Court of Ohio for sustaining the law in question.

It is argued that because the plaintiff in error is a corporation, and that the business of doing insurance in Ohio is a franchise; that when the corporation was granted the privilege of exercising the franchise, it accepted the privilege with the burden of complying with this law, but that is only begging the question. The law deprives both the insured and insurer of property rights, as we have already pointed out. Not only that, but the insurance companies are only bound by such laws as are constitutional. It does not undertake to obey every enactment passed by the legislature. If so, the legislature might pass an act entirely confiscating the property of insurance companies, or persons doing the business of insurance in the State of Ohio.

It cannot be argued that this is a condition imposed upon foreign companies, because it applies equally as well, and is equally a hardship upon companies organized under the laws of the State of Ohio, and upon individuals doing insurance business in the State of Ohio.

If we have argued to any purpose, and the authorities which we have cited are good law, we have shown that the statute in question is an arbitrary, unjust and unequal interference with the liberty and property of the plaintiff in error and others, and that it deprives the plaintiff in error, and others of the equal protection of the laws; that it is unjust

and odious class legislation; that it is clearly not within the police power of the legislature, and that it is directly inhibited by the Fourteenth Amendment to the Constitution of the United States and should be declared null and void.

Respectfully submitted,

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APPENDIX.

THE JOHN HANCOCK LIFE INS. CO. *vs.* WARREN.

Life insurance policy—Defense of false answers to questions in application—Material nature of such answers—Section 3625, Revised Statutes.

Section 3625, Revised Statutes, is a valid constitutional enactment; and to constitute a defense to a policy of insurance by reason of false answers to questions in the application, it must be clearly proven that the answers to such questions were willfully false and were fraudulently made, that the same were material, and induced the company to issue the policy, and that but for such answers the policy would not have been issued, and that neither the company nor its agents had knowledge of the falsity or fraud of such answers at and before the delivery of the policy.

(*Decided October* 11, 1898.)

Error to the Circuit Court of Delaware County.

The action below was by William W. Warren against the John Hancock Mutual Life Insurance Company of Boston, Massachusetts, to recover the amount of a policy of life insurance on the life of George E. Warren, son of the plaintiff below. The first ground of defense denied that George E. Warren was in good health at the time the policy was issued, and denied generally the allegations of the petition. The second ground of defense was in the words and figures following:

> "The defendant says that the policy of insurance set forth in the plaintiff's petition, and upon which his action is based, was issued upon an application made by the deceased, George E. Warren, to this defendant, which application is referred to and made a part of said policy of insurance, and that said policy of insurance

provided that if any of the statements made in said application are untrue in any respect, said policy shall be void.

"The defendant further says that the said application of the said George E. Warren contained certain interrogatories therein, in answer to which interrogatories the said George E. Warren stated that at the time said application was made he was in good health, that he had not been obliged to consult a doctor during the ten years last preceding the date of said application, except once, and that was in 1893, for malarial fever, which sickness was of one week's duration; that the last time he had consulted a physician was in the year 1893, on account of said attack of malarial fever; that he had never had or been predisposed to the disease known as syphillis, and that he had never had any illness or disease other than malarial fever in 1893.

"The defendant says that at the time said statements were made, they were all and each of them false and untrue, and were known to be so by the said George E. Warren at the time he made them, and that they were made by said George E. Warren for the purpose of defrauding this defendant.

"The defendant also says that at the time said application was made the said George E. Warren had syphilis and he knew it; that he had been obliged frequently during the ten years immediately preceding the making of said application to consult a physician on account of said disease; that he had had a disease or diseases other than as stated in his said application, and that he was not at the time said application was made in good health.

"This defendant says that the said statements in said application contained were the basis upon which the said contract or policy of insurance mentioned in the plaintiff's petition was issued, and that said contract of insurance would not have been entered into, and said policy of insurance would not have been issued, except that this defendant relied upon the truthfulness of said statements, and this defendant is not liable upon said policy of insurance, and prays to be discharged from this action, and to recover its costs herein."

The reply admitted that the policy was issued upon the application set out in the answer, and that George E. Warren stated in his application that he was in good health, and denied the remainder of the answer, and claimed that the Insurance Company was estopped from denying the truth of the application. On the trial evidence was given tending to support the answer, and by the plaintiff below tending to support the truth of his reply, and the verdict and judgment were in favor of the plaintiff below for the full amount of the policy. The principal controversy in the trial of the case arose upon Section 3625, Revised Statutes, which is as follows:

> "No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer."

The Circuit Court affirmed the judgment of the Court of Common Pleas, and thereupon the Insurance Company filed its petition in error in this Court, seeking to reverse the judgment.

By the Court—

In this State the subject matter of insurance is a franchise. (*State ex rel.* v. *Ackerman et al.*, 51 Ohio St., 163.) And the State has a right to prescribe the terms and conditions upon which it grants such franchise, and the Insurance Company having accepted the franchise with its terms and conditions, is bound thereby, and must accept the burdens with the benefits. Section 3625 was in force at the time this policy of insurance was issued, and therefore the legal effect is the

same as if the section was copied into and made a part of the policy. The section is, therefore, a valid constitutional enactment. This section was held constitutional by this Court in *National Life Insurance Co.* v. *Probst*, 56 Ohio St., 728. . The case of *Insurance Co.* v. *Pyle*, 44 Ohio St., 19, was decided before this section was enacted, and therefore, cannot control the matter. This section was passed for the purpose of abrogating the rule laid down in that case.

The Court of Common Pleas, in the trial of the case, construed this section as requiring clear proof that the answers to the several questions by George E. Warren were willfully false, and were fraudulently made, and were material, and induced the Company to issue the policy, and that but for such answers the policy would not have been issued, and that the Company and its agents had no knowledge of the falsity or fraud of such answers at and before the delivery of the policy. In this there was no error. Such are the provisions of this section of the statute, and the statute should be construed so as to effect the intention of the legislature in passing the same. It will be noticed that the Insurance Company fails to allege that the answers to the questions were material, and without such allegation the answer failed to state a ground of defense, as it matters not how false and how fraudulent such answers may be, if they are not material, they furnish no ground for defense to the company issuing the policy. There is, therefore, no error in the record, and the *Judgment is Affirmed.*

I hereby certify that the foregoing is a true and exact copy of the decision and opinion of the Supreme Court of Ohio, as officially prepared and published, in the above entitled case.

E. O. RANDALL,
Supreme Court Reporter.